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Supreme Court, U.S.
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No. 08-

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IN THE

Supreme Court of the United States

AMY ROBERTSON, individually and as Guardian Ad Litem for RYDER ROBERTSON (6/16/2003); CURTIS ROBERTSON, individually and as Guardian Ad Litem for RYDER ROBERTSON (6/16/2003);

Petitioners,

v.

COUNTY OF VENTURA, a political entity; JODY KELLER, an individual; SGT. WAREHAM, an individual; SCOTT PETERSON, an individual; DONNA KUENEN, an individual; THERESA MAYERNIK, an individual; HAROLD AMER, M.D., an individual; NEIL KAUFMAN, M.D., an individual; KENNETH WRIGHT, M.D., an individual,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does California Penal Code § 11172, a state statute granting immunity to mandated reporters, apply in a federal 42 U.S.C. § 1983 action?

2. Are private healthcare providers state actors for the purposes of 42 U.S.C. § 1983 when they serve a public function, act jointly with government officers, under governmental compulsion or coercion and the government is the nexus of the conduct?

3. Are public officials [Respondents Keller, Kuonen, Wareham, Mayernik and Peterson] entitled to the qualified immunity for conduct and functions which were not related to the initiation and filing of a petition to remove a minor from custody of his/her parents [*California Welfare & Institutions Code* § 300] and when they file false affidavits, coerce private individual to present false affidavits and do not have probable cause to remove a child from the custody of his parents?

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Petitioners Amy Robertson, individually and as Guardian Ad Litem for Ryder Robertson (6/16/2003) and Curtis Robertson, individually and as Guardian Ad Litem for Ryder Robertson (6/16/2003), respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The unreported opinion of the Court of Appeals is reproduced in the Appendix filed herewith, at A. The orders of the District Court in this case is reproduced at B and C.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 8 U.S.C. § 1254(1). The Court of Appeals entered its judgment on April 22, 2008.

STATUTES AND RULES INVOLVED

The pertinent provisions of 42 U.S.C. § 1983 are set forth below:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable

> to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The pertinent provisions of 42 U.S.C. § 5106a (b)(2)(A)(vii) (hereafter "§ 5106a") are set forth below:

> (A) an assurance in the form of a certification by the chief executive officer of the State that the State has in effect and is enforcing a State law, or has in effect and is operating a Statewide program, relating to child abuse and neglect that includes — (vii) provisions for immunity from prosecution under State and local laws and regulations for individuals making good faith reports of suspected or known instances of child abuse or neglect."

The pertinent provisions of California Penal Code § 11164 (hereafter "§ 11164") concerning the duty to report child abuse are set forth below:

> "[A] mandated reporter shall make a report to an agency . . . whenever the mandated reporter, in his or her professional capacity

> or within the scope of his or her employment, has knowledge of or observes a child whom the mandated reporter knows or reasonably suspects has been the victim of child abuse or neglect . . . For the purposes of this article, "reasonable suspicion" means that it is objectively reasonable for a person to entertain a suspicion, based upon facts that could cause a reasonable person in a like position, drawing, when appropriate, on his or her training and experience, to suspect child abuse or neglect."

The pertinent provisions of California Penal Code § 11172 (hereafter "§ 11172") concerning the immunity of a mandated reporter are set forth below:

> "(a) No mandated reporter shall be civilly or criminally liable for any report required or authorized by this article, and this immunity shall apply even if the mandated reporter acquired the knowledge or reasonable suspicion of child abuse or neglect outside of his or her professional capacity or outside the scope of his or her employment. Any other person reporting a known or suspected instance of child abuse or neglect shall not incur civil or criminal liability as a result of any report authorized by this article unless it can be proven that a false report was made and the person knew that the report was false or was made with reckless disregard of the truth or falsity of the report, and any person who makes a report of child abuse or neglect

known to be false or with reckless disregard of the truth or falsity of the report is liable for any damages caused. No person required to make a report pursuant to this article, nor any person taking photographs at his or her direction, shall incur any civil or criminal liability for taking photographs of a suspected victim of child abuse or neglect, or causing photographs to be taken of a suspected victim of child abuse or neglect, without parental consent, or for disseminating the photographs with the reports required by this article. However, this section shall not be construed to grant immunity from this liability with respect to any other use of the photographs."

STATEMENT OF THE CASE

On February 24, 2004, Ryder Robertson was admitted to the local hospital with very severe symptoms of lethargy, irritability and vomiting. The hospital personnel found that Ryder was suffering from dehydration and was so weak that his legs could not support him nor could he sit up. While examining Ryder, a nurse noticed a tense, large bulge located at the anterior fontanel, which is one of the two "soft spots" on an infant's head. After further examination and a CT scan, it was discovered that Ryder was suffering from bilateral acute and subacute subdural hematomas or hygromas. The personnel at the hospital immediately arranged for a transfer to Cedars Sinai Hospital in Los Angeles. After examining Ryder, the surgeon recommended that Ryder undergo intracranial surgery immediately. A very successful surgery was performed

on February 25, 2004. Post-surgery, on February 25, 2004, a report was generated internally by the staff at Cedars-Sinai Hospital that found the family had no problems which might impact discharge plans and noted that there was no suspected abuse or neglect and the child was not subject to any risk factors.

In spite of the Cedars-Sinai report, on February 25, 2004, Jennifer Minkoff, the social worker at Cedars-Sinai, filed a report of suspected child abuse with the Ventura County Human Services Agency, pursuant to California Penal Code § 11164 *et seq*. As a result of the Minkoff report, on February 26, 2004, Respondents Kuonen and Mayernik made a decision that Ryder needed altered parenting because of the risk of injury. Respondents Keller, Kuenen and Mayernik came to the erroneous conclusion that Ryder had an altered brain function. There was never any evidence at any time that Ryder ever had an altered brain function. During the same period, Respondents Keller, Kuonen and Mayernik, without knowing or investigating any of the circumstances of Ryder's birth and/or what may have caused Ryder's condition and without any evidence to support their theory, decided that Ryder must have been a victim of Shaken Baby Syndrome (hereinafter "SDS.")

On February 26, 2004, Respondents Kuonen, Keller and Mayernik began soliciting "a letter of detriment regarding this non-accidental trauma" from Respondents Amer and Kaufman. Respondents Amer and Kaufman rejected this solicitation. From February 28, 2004 until March 3, 2008, Respondent Kuonen, Keller and Mayernik continued to solicit "a letter of detriment regarding this non-accidental trauma" from Respondent

Amer and Kaufman. Neither Respondent Amer or Kaufman would agree to prepare the letter of detriment stating Ryder was a victim of SDS.

Respondent Keller acknowledged to Petitioners that absent a letter of detriment she did not have probable cause to arrest Petitioners for Shaken Baby Syndrome nor did she have any evidence to support placing a hold on Ryder.

Suddenly without consulting Ryder's prior health care-providers and without reviewing Ryder's previous medical records, on March 3, 2004, Respondent Amer wrote a letter of detriment to Ventura County Human Services Agency. Respondent Amer carefully worded his statement and qualified his statement to the extent that Ryder's condition was merely consistent with infantile shaking; the letter did not state categorically that Ryder was a victim of SDS. Respondent Amer's letter shows his lack of proper medical probing in the possible causes of Ryder's condition.

Without consulting Ryder's prior health care-providers and not reviewing any of Ryder's previous medical records, on March 15, 2004, Respondent Kaufman wrote a letter to Ventura County Human Services Agency stating that Ryder's condition was compatible with "SDS." However as did Respondent Amer, Respondent Kaufman carefully crafted his statement; Kaufman never states that he personally concluded that Ryder was a victim of SDS; Kaufman further distanced himself from any conclusion that Ryder was a victim of SDS by stating: "[H]owever, the

possibility of very minor trauma causing the bleeding in the context of an existing subacute subdural hematoma is also a reasonable explanation."

On March 4, 2004, Respondents Kuonen and Mayernik submitted a false report entitled "Individualized Health Care Plan" to the Ventura County Human Services Agency. In this false report, Respondent Kuonen falsely stated that "Ryder was a happy thriving baby prior to his injuries which are life threatening. Child has history of reflux." Upon submitting the above mentioned false report but prior to the filing of the *§ 300* Petition, Ryder was placed on a hold placed by Respondent Kuenen. The erroneous report and the false letter of detriment by Respondent Amer were sufficient to place a hold on Ryder. On March 8, 2004, Respondent filed a petition in the Superior Court for Ventura County requesting Ryder be taken from his parents, placed in foster care, but not with his maternal grandparents. On March 10, 2004, the Superior Court of Ventura County issued a § 319 Detention Findings and Orders; Out of Home, ordering Ryder be placed in foster care. On March 11, 2004, Ryder was released from Cedars-Sinai Hospital into the care of a foster parent, Shelly Burns, who had no training in the care of a child in Ryder's post-surgery condition. On March 11, 2004, Respondent Kuonen prepared and executed another false report entitled: "Child's Needs and Services Plan." Respondent Kuonen stated in that report: "Ryder was a happy thriving baby prior to his injuries. Child sleeps through the night." On March 12, 2004, by order of the Superior Court of Ventura County, the out-of-home order was modified so that Ryder was

relocated to his eighty (80) year old maternal grandparents over the objections of Respondents Keller, Mayernik and Kuonen.

After five months of being in the custody of his grandparents, on August 16, 2004, the Superior Court of Ventura County, Judge Charles Campbell presiding, began a trial on the § 300 petition. After a lengthy bench trial, Judge Campbell dismissed the petition and ordered Ryder returned to the custody of his parents. No criminal charges have ever been filed against Amy Robertson or Curtis Robertson or any other person. Subsequent medical examinations and tests have uncovered significant defects due to the trauma of the birth.

On January 18, 2005, Petitioners filed a Complaint and on June 6, 2005, Petitioners filed a Second Amended Complaint, which is the operative pleading in this matter. On June 15, 2005, Respondents Wareham, Keller, Kuonen, Peterson and County of Ventura filed their Answer. On June 21, 2005, Respondents Amer and Kaufman filed a Rule 12(b)(6) Motion to Dismiss. On July 6, 2005, Respondent Wright filed his Answer. On August 26, 2005, after Petitioners' opposition and Respondents' Reply was timely filed, the District Court granted Respondents Amer and Kaufman's Motion to Dismiss On or about September 7, 2005, Respondent Wright filed a Rule 12(c) Motion for Judgment on the Pleadings which was granted on October 4, 2005. On November 28, 2005, Petitioners requested an order certifying an interlocutory appeal on the issue of whether California Penal Code § 11172 applied to Respondents Wright,

Amer and Kaufman under the circumstances of this matter. The District Court denied the request for an Interlocutory Appeal.

On February 24, 2006, Respondents Wareham, Keller, Kuonen, Peterson and County of Ventura filed a Motion for Summary Judgment as did Respondent Mayernik on February 27, 2006. On April 24, 2006, the court granted Respondents Wareham, Keller, Kuonen, Peterson and County of Ventura's Motion for Summary Judgment.[1] After judgment was entered in favor of Respondent Mayernik, a timely Notice of Appeal was filed on May 19, 2006.

After extensive briefing and oral argument by the parties, on April 22, 2008, the Ninth Circuit Court of Appeals issued a Memorandum (unreported). The Court of Appeals' Memorandum was a mere two and a quarter pages which did not address the issues in any detail and did not cite any facts attributable to the law that it erroneously applied. Although Ryder Robertson was taken from his parents and placed in the custody of a

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1. At the hearing on Respondents Wareham, Keller, Kuonen, Peterson and County of Ventura's Motion for Summary Judgment, the District Court declined to issue a statement of findings of fact and conclusions of law. The Court declined to adopt the Statement of Uncontroverted Facts and Conclusions of Law offered by Respondents. The Court entered a judgment based on the rulings it had made during the oral argument at the hearing. In the minute order of April 24, 2006, the Court stated "For the reasons on the records, the Court GRANTS the above motions. Judgments to issue." The sum and substance of the District Court's decision was "Defendants have absolute immunity."

third party for five months without probable cause based on fabricated evidence, based on a fantasy SDS claim and by the unlawful conduct of Respondents Keller, Mayernik, Kuenen, Peterson and Wareham, the Court of Appeals, without any uncontroverted facts to rely upon, decided that Petitioner's constitutional rights were not violated by Respondents. The Court of Appeals never explained why presenting false evidence to a court and removing an infant from his parents without probable cause is not a violation of one's constitutional rights.

Although the District Court acknowledged that Respondents Amer, Kaufman and Wright were state actors for purposes of 42 U.S.C. § 1983, the District Court held that they had immunity pursuant to § 11172. On the other hand, the Court of Appeals, upon review, without citing any uncontroverted facts upon which they relied and contrary to the case law in every case addressing this issue, held that Respondents were not state actors. Because the Court of Appeals held that Respondents Amer, Kaufman and Wright were not state actors, it never addressed the issue on which the District Court dismissed the matter, whether § 11172 applied in a 42 U.S.C. § 1983 case.

REASONS FOR GRANTING THE PETITION

This Court should grant the Writ: (1) In order to resolve issues concerning a plaintiff's rights in pursuing 42 U.S.C. § 1983 claims against social service workers and other personnel who claim immunity under state law; 2) Because a district court has so far departed from precedential law and the Court of Appeal sanctioned such a departure by the District Court; and 3) Because a United States District Court and a United States Court of Appeals has decided an important question of law which has not been but, should be settled by the Supreme Court, and has decided a federal question in a way that conflicts with the other applicable decisions of the Supreme Court.

I. A PRIVATE INDIVIDUAL WHO CONSPIRES WITH A STATE SOCIAL SERVICE OFFICIAL IS NOT ENTITLED TO THE ABSOLUTE IMMUNITY PROVIDED BY A STATE STATUTE IN A 42 U.S.C. § 1983 ACTION

Review is warranted to resolve the issue of whether a mandated reporter [who is a private individual] who conspires with a state social service official is or is not entitled to the same immunity that is provided to a public official. Review is also warranted to resolve the issue of whether a mandated reporter [who is a private individual] is or is not entitled to absolute immunity pursuant to a state statute [California Penal Code § 11172] in a 42 U.S.C. § 1983 action.

A. PRIVATE INDIVIDUALS WHO CONSPIRE WITH STATE OFFICIALS ARE NOT ENTITLED TO SAME IMMUNITY AS THE STATE OFFICIAL.

Private persons who conspire with a public official in conjunction with the public official's performance of his official duties, are acting under color of state law for the purpose of § 1983, even if the public official ultimately is immune from civil liability. A private person who acts in concert with a public official to violate the constitutional rights of an individual is not entitled to the immunities offered to the public official. *Wyatt v. Cole*, 504 U.S. 158 (1992) (private persons are not entitled to immunity under § 1983). "Immunity for private defendants was not so firmly rooted in the common law, and was not supported by such strong policy reasons as to create an inference that Congress meant to incorporate it into § 1983." *Id.*

Respondents Amer, Kaufman and Wright, who are alleged to have conspired with Keller, Kuenen and Mayernik in having Ryder Robertson taken from his parents, are not entitled to the same immunities as Keller, Kuenen and Mayernik.[2]

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2. Respondents Amer and Kaufman were dismissed after filing a Rule 12(b)(6) and Rule 12(c) motions. Respondent Wright was dismissed pursuant to a Rule 12(c) for judgment on the pleadings. This was an inappropriate holding in that in both a Rule 12(b)(6) and Rule 12(c) motions, "[A] complaint should not be dismissed unless it appears beyond doubt that the Plaintiffs can prove no set of facts in support of their claim that would entitle them to relief." *Id.* In reviewing the dismissal, we must take all (Cont'd)

Public officials are generally granted immunity from claims that allege tortuous conduct which is within the course and scope of their public employment. The state takes on that liability under the state torts claim act which permits suit against the state and abrogates the sovereign immunity of the state. However, state immunity statutes have no application in federal constitutional claim pursuant to § 1983.

Private persons who act in concert with public officials may be become liable in a § 1983 action if certain conditions are met; but much to the consternation of the private individual, the immunities afforded the public officials are not afforded to the private individuals who are found to have become state actors.

Mandated reporters are required by law to report certain conduct to the state officials. Moreover, in a § 1983 action, if the mandated reporter works in concert with and conspires with state officials, they are not afforded the same state and federal immunities granted to public officials.

Petitioners pray the Court grant the Writ of Certiorari to consider the issue of whether mandated reporters, pursuant to § 11164 *et seq.* and other similar state statutes, are entitled to the same immunities afforded state actors in a § 1983 action.

(Cont'd)
allegations of material fact in the Complaint as true and construe them in the light most favorable to the Plaintiffs. Although petitioners' adequately pleaded the conspiracy cause of action and the Fourth and Fourteenth Amendment causes of action, the Court of Appeals determined that these Respondents did not violate the constitutional rights of Petitioners.

B. STATE IMMUNITY STATUTES HAVE NO APPLICATION IN A FEDERAL § 1983 ACTION

In the Rule 12(b)(6) Motion to Dismiss [Amer and Kaufman] and the Rule 12(c) [Wright] Motion for Judgment on the Pleadings, the District Court held that, as a matter of law, a state statutory immunity provision [§ 11172] is applicable in a federal § 1983 action. In particular, the District Court held that in response to 42 U.S.C. § 5106a, the California legislature enacted California Penal Code § 11166 which requires persons who are designated as mandated reporters, to report behavior which they interpret as child abuse. Additionally, the California legislature enacted California Penal Code § 11172 which grants immunity from civil liability to those mandated reporters who make such reports pursuant to § 11166. "[T]he Court rejects Plaintiffs' contention that recognizing and enforcing the Moving Defendants' immunity is inconsistent with the intent of Congress as expressed in the Child Abuse Prevention and Treatment Act ("CAPTA") *see* 42 U.S.C. § 5106a." Contrary to the District Court's holding, Petitioners did not argue that granting immunity to Respondents was inconsistent with the intent of Congress; Congress gave no indication of its intent. Petitioners argued that there is a long standing rule that state immunity statutes are not applicable to federal § 1983 actions and Congress did nothing in § 5106a to abrogate that rule. When enacting § 5106a, Congress was very specific and limited the immunity from suit to state and local laws and regulations.

Congress enacted 42 U.S.C. § 5106a(b)(2)(A)(vii) (hereafter "§ 5106a") which provides: "(A) an assurance in the form of a certification by the chief executive officer of the State that the State has in effect and is enforcing a State law, or has in effect and is operating a Statewide program, relating to child abuse and neglect that includes — (vii) provisions for immunity from *prosecution under State and local laws and regulations* for individuals making good faith reports of suspected or known instances of child abuse or neglect." (Emphasis added) Congress required the states to enact statutes which immunized mandated reporters from being sued under state and local laws and regulations. There is no mention of immunization from suit under the Constitution or statutes of the United Sates of America. There was no implication that Congress intended to immunize mandated reporters from constitutional claims.

The State of California responded by enacting Penal Code § 11172 which provides in pertinent part: "No mandated reporter shall be civilly or criminally liable for any report required or authorized by this article . . ."

The issue thus becomes: Is § 11172 applicable in a federal § 1983 action which alleges a violation of the Constitution of the United States; *i.e.*, does § 11172 and other states' mandated reporter immunity statutes, protect mandated reporters from suit in a federal court pursuant to § 1983? The law is very clear that it does not. An immunity claim in a § 1983 action raises a

question of federal not state law. As this Court held in *Martinez v. California*, 444 U.S. 277, 284 n.8 (1980):

> "Conduct by persons acting under color of state law which is wrongful under 42 U.S.C. § 1983 or § 1985(3) cannot be immunized by state law. A construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced. (Citation omitted) 'The immunity claim raises a question of federal law.' (Citation omitted) "

State law immunities do not have any application in § 1983 actions. In spite of this long established bright line approach by this Court, the District Court disregarded existing law [*Martinez supra*] and held that § 11172 [a state immunity statute] applied in this case and dismissed the matter with prejudice. The District Court held that it was the intent of Congress to immunize mandated reporters from suit under any circumstances in any court at any time and that policy did not detract from an individual's ability to seek relief in a § 1983 action from a violation of his/her constitutional rights. The District Court attempted to [and unless this Court reserves that decision], has enacted a public policy which is contrary to *Martinez supra* and its progeny.[3] *Martinez*

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3. A number of district courts and state courts have also held that a statute similar to § 11172 grants immunity in § 1983 (Cont'd)

supra has been the law of the land for twenty-eight years and has been cited hundreds of times for the proposition that federal law not state law control the immunity issue in § 1983 actions. Petitioners can find no Federal Court of Appeals cases which holds to the contrary. This Court has had many opportunities to overturn the rule of *Martinez supra* but has not been inclined to do so. Congress has had twenty-eight years to overturn this Court's holding in *Martinez supra* and has not done so.

Unfortunately, the Court of Appeals did not reach this issue and avoided the issue by holding that Respondents Amer, Kaufman and Wright were not state actors. [Petitioners will address this issue below] State action is an essential element in a § 1983 action and absent state action, the § 1983 action must fall. By holding that Respondents, Amer, Kaufman and Wright were not state actors, the Court of Appeals avoided addressing the issue of § 11172 immunities.

Petitioners pray the Court grant the Writ of Certiorari to consider the issue of whether § 11172 and other similar state immunity statutes afford absolute immunity to mandated reporters who violated the constitutional rights of an individual.

(Cont'd)
action *See Thomas v. Chadwick*, 224 Cal.App.3d 813 (1990); other court have refused to do so. *But, see Doe v. Regents of University of California* (E.D.Cal. 2006) No. CIV. S-06-1043 LKK/DAD.

II. A PRIVATE INDIVIDUAL WHO CONSPIRES WITH A STATE SOCIAL SERVICE OFFICIAL TO VIOLATE THE CONSTITUTIONAL RIGHTS OF AN INDIVIDUAL IS A STATE ACTOR IN A 42 U.S.C. § 1983 ACTION.

The issue is whether mandated reporters are state actors when they comply with § 11166 or other state's similar statutes. Although the parties briefed this issue extensively, the District Court did not directly address the issue. There was no reference in any written order and only a passing reference to state action in oral argument. The District Court stated: "I think the conspiracy allegations in the act (sic) or bases (sic) are sufficiently pled to probably warrant denying the motion on that ground. But the immunity issue and particularly the supremacy clause is the one that I think may be dispositive." The District Court then went on to address the issue of immunity pursuant to § 11172. If the District Court had been inclined to find that these Respondents were not state actors, it would not have reached the issue of immunity because the issue of immunity becomes moot if the Respondents are not state actors. Therefore, by stating that conspiracy cause of action was pleaded sufficiently, the District Court apparently reached the conclusion that these Respondents were state actors. The District Court also did not consider the issue of whether the Constitutional rights of Petitioners were violated, or whether there was injury to Petitioners. The District Court correctly construed the allegations in the Complaint as true and proceeded to the issue of immunity.

On the other hand, the Court of Appeals, reviewing the matter de novo, held that Respondents Amer, Kaufman and Wright were not state actors and never addressed the issue of the mandated reporters' § 11172 immunity. The Court of Appeals erroneously relied upon *Sutton v. Providence St. Joseph Medical Center*, 192 F.3d 826 (9th Cir. 1999). The *Sutton* court in addressing this issue, followed and restated *Blum v. Yaretsky*, 457 U.S. 991 (1982): ". . . the compulsion factor functions differently in cases 'in which the defendant is a private party.'" *Sutton supra* at 839 "[T]the Court merely applied the well-accepted principle that a private party's joint participation in a conspiracy with the state provides a sufficient nexus to hold the private party responsible as a governmental actor." *Id.* at 840

In spite of the fact that the compulsion factor is not required where a private individual is alleged to be a state actor, in the case at bar, it is an important element in that mandated reporters are required [compelled] to comply with § 11166 and report exactly as state law prescribes. Absent compliance with § 11166, mandated reporters may be criminally libel. The state, pursuant to § 11166, requires that mandated reporters report any incident that they believe to be child abuse. This requirement in § 11166 fulfils the compulsion requirement. In addition, *Sutton* and *Blum* require that another factor, either participation, joint action, public function and/or governmental nexus to be present.

While generally not applicable to private parties, a § 1983 action can lie against a private party when "he is

a willful participant in joint action with the State or its agents." *Dennis v. Sparks*, 449 U.S. 24, 27 (1980).

> "What is fairly attributable [as state action] is a matter of normative judgment, and the criteria lack rigid simplicity. . . . [N]o one fact can function as a necessary condition across the board . . . nor is any set of circumstances absolutely sufficient, for there may be some countervailing reason against attributing activity to the government."

Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295-96 (2001). Nonetheless, we recognize at least four different criteria, or tests, used to identify state action: "(1) public function; (2) joint action; (3) governmental compulsion or coercion; and (4) governmental nexus." *Kirtley v. Rainey*, 326 F.3d 1088, 1092 (9th Cir. 2003) citing *Sutton supra* Satisfaction of any one test is sufficient to find state action, so long as no countervailing factor exists. *Id* at 1092

In the case at bar, all of these factors are present. Respondents were willing joint participants in a joint action with Respondents Keller, Kuenen and Mayernik in a public function which had a governmental nexus. The conspiracy to remove Ryder from the custody of his parents meets the criteria of three of the four above-mentioned prongs of the test and possibly the fourth if Respondents argue that they were not willing participants in the conduct to remove Ryder from his parents custody; they were coerced. However, Respondents did not argue they were unwilling

participants or they wrote the letters of detriment under duress or coercion. Respondents do not argue that there was not joint action or that it was not a public function or there was no governmental nexus.

"[C]onstitutional standards are invoked only when it can be said that the State is responsible for the specific conduct of which the plaintiff complains." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) In the case at bar, the State of California is responsible to the specific conduct of Respondents, i.e. requiring Respondents to file reports of child abuse.

The determination of whether the specific conduct of which the plaintiff complains constitutes state action is a "necessarily fact-bound inquiry." *Brentwood supra at 298* A challenged activity by a private entity may be deemed state action when the state exercises "coercive power," . . . or provides the private actor with "significant encouragement, either overt or covert," . . . or when the private actor "operates as a willful participant in joint activity with the State or its agents," *Brentwood supra* at 296 The element of significant encouragement, either overt or covert is crucial in the case at bar. If Respondents had not filed a report, Respondents Keller and/or Kuenen could have charged them with a failure to report pursuant to § 11166. Therefore the element of overt encouragement is present.

The Court of Appeals, without comment or discussion, concluded that these Respondents were not state actors. The Court of Appeals erroneously held that "these doctors were not state actors." The Court of Appeals gave no reason for finding that Respondents

were not state actors. The Court of Appeals did not explain or distinguish the factors of coercion, joint action, willing participation and a public function.

Petitioners established without objection that Respondents were coerced by Respondents Keller, Kuenen and Mayernik into reporting this incident, this action was joint with Respondents Keller, Kuenen and Mayernik. Based on the foregoing, Petitioners pray this Court grant a Writ of Certiorari to resolve the issue of whether mandated reporters are state actors when they comply with the state statute and report incidents of child abuse.

IV. A STATE SOCIAL SERVICE OFFICIAL IS NOT ENTITLED TO QUALIFIED IMMUNITY FOR FILING FALSE STATEMENTS AND OMITTING EXCULPATORY EVIDENCE WHEN INVESTIGATING, PREPARING AND FILING PETITIONS TO REMOVE CHILDREN FROM THEIR PARENTS.

A public official who is a party to § 1983 suit is generally entitled only to immunities that existed at common law. *Imbler v. Pachtman*, 424 U.S. 409, 417-18 (1976). The courts have therefore "granted state actors absolute immunity only for those functions that were critical to the judicial process itself," such as "'initiating a prosecution.'" *Miller v. Gammie*, 335 F.3d 889, 896 (9th Cir. 2003) (en banc) (citing *Imbler*, 424 U.S. at 431) It follows that social workers have absolute immunity when they make "discretionary, quasi-prosecutorial decisions to institute court dependency proceedings to take custody away from parents." *Id.* at 898. On the

other hand, social service officials are not entitled to absolute immunity from claims that they fabricated evidence during an investigation or made false statements in a dependency petition affidavit that they signed under penalty of perjury, because such actions aren't similar to discretionary decisions about whether to prosecute. A prosecutor doesn't have absolute immunity if he fabricates evidence during a preliminary investigation, before he could properly claim to be acting as an advocate, *see Buckley v. Fitzsimmons*, 509 U.S. 259, 275(1993), or makes false statements in a sworn affidavit in support of an application for an arrest warrant, *see Kalina v. Fletcher*, 522 U.S. 118, 129-30 (1997). Furthermore, as prosecutors and others investigating criminal matters have no absolute immunity for their investigatory conduct, a fortiori, social workers conducting similar investigations have no such immunity. *See Id.* at 126.

In the case at bar, the District Court considered that Respondent Keller, a deputy sheriff, was functioning as a social service worker [the same as Kuenen] while investigating the matter. The District Court also considered Respondent Mayernik, a county nurse, was functioning as a social service worker [the same as Kuenen] while investigating the matter. The District Court analyzed all three of these Respondents by the same standard for purposes of absolute or qualified immunity. The Court of Appeals also analyzed all three respondents by the same standards.

The District Court never engaged a complete analysis for qualified immunity. 1) Was there a constitutional violation? 2) Was the law clearly

established? and 3) Would a reasonably trained public official believed he/she was violating a person's constitutional rights? The District Court never determined whether or not there was a constitutional violation. The District Court never determined whether or not the law was clearly established. The District Court never determined whether or not these Respondents believed they were violating Petitioners' constitutional rights. The District Court held "[A]nd it's on the basis of immunity that I grant the summary judgment as to the defendants, and you will hear why." However, the District court never explained why. The District Court refused to make any findings of fact whatsoever. Once a constitutional violation is established, "If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct" *Groh v. Ramirez*, 540 U.S. 551, 654 (2004)

On the other hand, the Court of Appeals skipped the first two elements of the qualified immunity test, and immediately determined without ever explaining why, that there was no constitutional violation of which a reasonable person would have known. Petitioners argue that any reasonable person would have known that the preparation of an affidavit with knowingly false statements for the purpose of having a child removed from his parents is a violation of one's Fourteenth Amendment rights. Petitioners argue that any reasonable person would have known that conspiring with doctors in the preparation of false "letters of detriment" for the purpose of having a child removed from his parents is a violation of one's Fourteenth Amendment rights. The Court of Appeals never

explained what those discretionary decisions supposedly made by Respondent, were and when they were made. The Court of Appeals never explained why filing false affidavits did not violate Petitioners' rights. The Court of Appeals never explained why Keller and Kuenen's action of taking Ryder into custody [placing a hold on him while he was still in the hospital and they admitted they did not have probable cause to hold him] was not violating his rights. The Court of Appeals never explained why Keller and Kuenen would not have known that filing false statement in an affidavit was not a violation of Petitioners' rights.

It appears the District Court and the Court of Appeals did not consider the filing of false reports, the solicitation of false letters of detriment and the placing of a hold on Ryder when they knew they did not have probable cause to place the hold are not violations of petitioners' constitutional rights. The law is clearly established that the filing of false reports or the solicitation of false affidavits is a violation of one's constitutional rights when it results in the removal of the infant from his parent's custody.

Based on the foregoing, Petitioners pray this Court grant a Writ of Certiorari to resolve the issue of whether social service workers, law enforcement officers and a county nurse are entitled to qualified immunity when they file false reports, solicit false affidavits and take a child into custody absent probable cause when that conduct results in the removal of the child from his parent's custody.

CONCLUSION

For the foregoing reasons, Petitioners pray the Court grant a Petition for a Writ of Certiorari.

Respectfully submitted,

RICHARD HAMLISH
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APPENDIX A — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED APRIL 22, 2008

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 06-55751

D.C. No. CV-05-00389-AHM

AMY ROBERTSON, individually and Guardian Ad Litem for RYDER ROBERTSON; CURTIS ROBERTSON, individually and as Guardian Ad Litem for RYDER ROBERTSON,

Plaintiffs - Appellants,

v.

COUNTY OF VENTURA, a political entity; JODY KELLER, as an individual who is employed by the Ventura County Sheriff's Department; WAREHAM, Sgt., as an individual whos is employed by the Ventura County Sheriff's Department, e/s/a David Wareham; SCOTT PETERSON, as an individual who is employed by the Ventura County Sheriff's Department; DONNA KUENEN, as an individual who is employed by the Human Services Agency of the County of Ventura, e/s/a Donna Kounen; THERESA MAYERNIK, as an individual who is employed by the Human Services Agency of the County of Ventura; HAROLD AMER, MD, an individual; NEIL KAUFMAN, MD, an individual; KENNETH WRIGHT, MD, an individual,

Defendants - Appellees.

Appendix A

Appeal from the United States District Court for the Central District of California
A. Howard Matz, District Judge, Presiding

Argued and Submitted April 10, 2008
Pasadena, California

Before: HALL, T.G. NELSON, and SILVERMAN, Circuit Judges.

MEMORANDUM*

Amy and Curtis Robertson, individually and as guardians ad litem for their child, Ryder Robertson, brought this 42 U.S.C. § 1983 action against various defendants based on the temporary removal of Ryder from his parent's custody. The Robertsons appeal the district court's grant of summary judgement in favor of Theresa Mayernik, Ventura County, and the County's employees. They also appeal the dismissal of their claims against Drs. Amer, Kaufman, and Wright. We have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm.

We review the district court's grant of absolute or qualified immunity de novo. *Botello v. Gammick*, 413 F.3d 971, 975 (9th Cir.2005). We review the district court's grant of summary judgment and dismissal for failure to state a claim de novo. *Woodrum v. Woodward County, Okla.*, 866 F.2d 1121, 1124 (9th Cir.1989); *Coverdell v.*

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Dep't of Soc. & Health Servs., State of Wash., 834 F.2d 758, 761 (9th Cir.1987).

The district court did not err when it granted summary judgment in favor of Ventura County on the Robertsons' *Monell* claim. The Robertsons did not put forth sufficient evidence that Ventura County ratified the employees' actions. *See Gillette v. Delmore*, 979 F.2d 1342, 1346-47 (9th Cir.1992).

The district court also properly granted summary judgment in favor of Donna Kuenen, Jody Keller, Theresa Mayernik, David Wareham, and Scott Peterson. Kuenen was entitled to absolute immunity for her actions related to the decision to initiate the detention hearing by filing the Section 300 petition and detention report. *See Beltran v. Santa Clara County*, 514 F.3d 906, 908 (9th Cir.2008).

Further, Kuenen's other actions and the actions of Keller, Mayernik, Wareham, and Peterson are entitled to qualified immunity. When these defendants were making discretionary decisions that were not similar to prosecutorial decisions, they were entitled to qualified rather than absolute immunity. *See Miller v. Gammie*, 335 F.3d 889, 898 (9th Cir.2003).

Kuenen and Keller are entitled to qualified immunity because their actions did not violate constitutional rights of which a reasonable person would have known. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Mayernik, Wareham, and Peterson are also entitled to

qualified immunity because there is no showing that they violated any of the Robertsons' established rights.

Finally, the § 1983 claim was properly dismissed as to Drs. Harold Amer, Neil Kaufman, and Kenneth Wright because these doctors are not state actors. *See Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 835 (9th Cir.1999). Moreover, there is no showing that any of their actions were improper.

AFFIRMED.

APPENDIX B — CIVIL MINUTES – GENERAL OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA DATED AUGUST 26, 2005

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. CV 05-389 AHM (FMOx)

Date August 26, 2005

Title AMY ROBERTSON, et al. v. COUNTY OF VENTURA, et al.

Present The Honorable A. Howard Matz

Stephen Montes
Deputy Clerk

N/A
Court Reporter / Recorder

Tape No.

Attorneys Present for Plaintiffs: No Appearance

Attorneys Present for Defendants: No Appearance

Proceedings: In Chambers

Appendix B

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP RULE 73(d)

Defendants Dr. Harold Amer and Dr. Neil Kaufman ("Moving Defendants") move to dismiss the claims alleged in the Second Amended Complaint ("SAC") against them. A hearing was held in this matter on August 22, 2005, and the Court took the motion under submission. The Court hereby GRANTS the motion to dismiss[1] with prejudice.

Plaintiffs assert two causes of action against the Moving Defendants: conspiracy to violate constitutional rights, and violation of 14th amendment rights actionable under 42 U.S.C. § 1983. Plaintiffs allege that each of the Moving Defendants "conspired to have Ryder Robertson taken from his parents and be placed in foster care . . . in violation of his Fourth and Fourteenth Amendment due process rights . . . ." *Id.*, ¶ 54. Specifically, Plaintiffs allege that the Moving Defendants "agreed to prepare letters of detriment for the purpose of obtaining a 'hold' on Ryder and filing a § 300 petition" and that they each wrote a "letter of detriment" to the Ventura County Human Services Agency that stated that the medical condition of Ryder Robertson was consistent with infantile shaking or Shaken Baby Syndrome ("SBS"). SAC, ¶¶ 40, 41, 43.

Pursuant to Cal. Penal Code § 11172, "[n]o mandated reporter shall be civilly or criminally liable

1. Docket No. 45.

for any report required or authorized by this article, and this immunity shall apply even if the mandated reporter acquired the knowledge or reasonable suspicion of child abuse or neglect outside of his or her professional capacity or outside the scope of his or her employment." Penal Code § 11165.7(a) defines "mandated reporter" as, among other things, a "(21) physician, surgeon, psychiatrist, psychologist, dentist, resident, ..." Therefore, The Moving Defendants are mandated reporters under the statute.

Mandated reporters are required to make a report whenever they have knowledge of or observe a child whom they know or reasonably suspect that a child has been the victim of child abuse or neglect. Cal. Penal § 11166. The Moving Defendants' "letters of detriment," which reported to a county agency that Ryder's condition was consistent with SBS, are properly classified as mandated reports pursuant to the statute. *See also Stecks v. Young*, 38 Cal. App. 4th 365, 375 (1995) (§ 11172 protection extends to untimely reports).

Even if the Moving Defendants' "letters of detriment" were not considered mandated reports under § 11166, they were authorized reports to the Ventura County Human Services Agency. *See* Cal. Penal § 11167(b) and (c). Reports authorized under the statute are equally protected under the immunity provision of § 11172. *Ferraro v. Chadwick*, 221 Cal. App. 3d 86, 95 (1990) (holding that § 11172 cloaks a mandated reporter with immunity for activity after the report of suspected child abuse mandated by § 11166(a) is made).

Appendix B

Plaintiffs' reliance on *James W. v. Superior Court*, 17 Cal. App. 4th 246 (1993), for the proposition that only the original report of suspicion of child abuse is entitled to the protection of § 11172, is misplaced. The facts of *James W.* are very different from those alleged in the SAC. As just two examples, the Moving Defendants are doctors, not private family counselors, and the Moving Defendants did not conduct a two year campaign to have anyone convicted of child abuse, but rather filed mandated or authorized reports to the county agency that did not accuse anyone of child abuse.

Moreover, the California Child Abuse and Neglect Reporting Act ("CANRA") has been amended in ways that expand the protections of the immunity provision on at least three occasions. California and federal district courts have consistently found doctors who report suspected child abuse immune from civil liability under § 11172 and similar provisions. *See Thomas v. Chadwick*, 224 Cal. App. 3d 813 (1990); *Ferraro v. Chadwick, supra*; *Storck v. Suffolk County Dep't of Soc. Services*, 62 F. Supp. 2d 927 (E.D.N.Y. 1999); *Bryant-Bruce v. Vanderbilt Univ., Inc.*, 974 F. Supp. 1127, 1141 (M.D. Tenn. 1997); *Haag v. Cuyahoga County*, 619 F. Supp. 262 (N.D. Oh. 1985).

The Court rejects Plaintiffs' contention that recognizing and enforcing the Moving Defendants' immunity is inconsistent with the intent of Congress as expressed in the Child Abuse Prevention and Treatment Act ("CAPTA"). *See* 42 U.S.C. § 5106a. Nor, as some of the above-cited decisions reflect, does this ruling detract

from or otherwise reduce the power of § 1983 to protect individuals' rights. Congress enacted CAPTA after it enacted Section 1983, and the public policies that both CAPTA and the CANRA promote are best served by this result.

For the reasons discussed above, the Court GRANTS the Moving Defendants Motion to Dismiss with prejudice.

As discussed at the hearing in this matter, Plaintiff asserts no claims against Dr. Moishe Danielpour and Dr. Lizbeth Vencencio-Regner, even though they are named in the caption, and they are hereby DISMISSED with prejudice.

Initials of Preparer [illegible]

APPENDIX C — EXCERPT OF REPORTER'S TRANSCRIPT DATED APRIL 24, 2006

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HONORABLE A HOWARD MATZ,
JUDGE PRESIDING

NO. CV05-389-AHM

AMY ROBERTSON, ET AL.,

PLAINTIFFS,

VS

COUNTY OF VENTURA, ET AL.,

DEFENDANTS.

REPORTER'S TRANSCRIPT OF PROCEEDINGS
LOS ANGELES, CALIFORNIA MONDAY,
APRIL 24, 2006

[Commencing at Page 4]

* * *

THE COURT: YOUR FIRST COUNT IS CONSPIRACY TO VIOLATE YOUR CLIENT'S FOURTEENTH AMENDMENT RIGHTS TO BE FREE FROM INTERFERENCE IN THEIR FAMILIAL RELATIONSHIPS. THAT'S A FEDERAL CONSTITUTIONAL CLAIM.

Appendix C

YOUR SECOND CLAIM — ALL ARISING OUT OF THE SAME. ASSERTED FACTS — IS FOR A VIOLATION OF THE FOURTH AMENDMENT.

YOUR THIRD CLAIM IS FOR VIOLATION OF THE FOURTEENTH AMENDMENT, ONCE AGAIN, DEPRAVATION OF FAMILIAL INTERESTS.

IN TERMS OF DETERMINING WHETHER THE DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT BASED ON GROUNDS OF IMMUNITY, DON'T YOU AGREE THAT AS TO ALL THREE COUNTS, THE ANALYSIS IS THE SAME?

MR. HAMLISH: AS FAR AS IMMUNITY IS CONCERNED, YES, OKAY.

THE COURT: AND IT'S ON THE BASIS OF IMMUNITY THAT GRANT THE SUMMARY JUDGMENT AS TO THE DEFENDANTS, AND YOU WILL HEAR WHY. AND ALL OF THOSE DEFENDANTS —

MR. HAMLISH: MAY I MAKE ONE DIFFERENTIATION?

THE COURT: YES.

MR. HAMLISH: THE ANALYSIS ON ABSOLUTE IMMUNITY AND QUALIFIED IMMUNITY ARE DIFFERENT ANALYSES.

THE COURT: OH, I KNOW THAT.

MR. HAMLISH: OKAY. JUST —

THE COURT: I AM AWARE OF THAT.

UNITED STATES DISTRICT COURT

[Page 5] MR. HAMLISH: THAT'S WHY I DON'T — I DON'T THINK

2 THE ANALYSIS TOWARD KELLER SHOULD BE ON ABSOLUTE IMMUNITY. IT SHOULD BE ON QUALIFIED IMMUNITY. THAT'S WHY I WAS HESITATING.

THE COURT: OKAY. WELL, ON — I THINK ALL THREE WOULD BE ENTITLED TO ABSOLUTE IMMUNITY. I THINK THAT THE SAME IS TRUE EVEN IF THE APPLICABLE STANDARD FOR EITHER KELLER OR FOR MAYERNIK WERE QUALIFIED IMMUNITY. I WILL TELL YOU WHY IN JUST A MINUTE.

THE NEXT QUESTION I HAD WAS THAT MY UNDERSTANDING FROM THESE VOLUMINOUS PAPERS IS THAT YOU HAVEN'T OPPOSED THE COUNTY'S MOTION TO DISMISS THE MONELL CLAIM; CORRECT?

MR. HAMLISH: I HAVEN'T OPPOSED IT?

THE COURT: YES.

MR. HAMLISH: THE ISSUE THERE IS —

THE COURT: YOU HAVE ADMITTED THAT YOU HAVE NO FACTS TO SUPPORT THE CLAIM IN THE SGI AT PARAGRAPH 31.

MR. HAMLISH: YEAH, WELL —

THE COURT: OKAY.

MR. HAMLISH: BUT I — THAT DOES NOT MEAN WE DON'T — WE HAVE NOT — WE WERE OMITTING THE — BECAUSE WE ARE LOOKING AT RATIFICATION RATHER THAN POLICIES AND PROCEDURES. THAT'S — THAT'S MY CLAIM AGAINST THE COUNTY IS THE MONELL CLAIM. IT'S THE RATIFICATION OF RATHER THAN THE POLICIES AND PROCEDURES —

* * * *

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(2)

No. 08-98

Supreme Court, U.S.
FILED
AUG 12 2008
OFFICE OF THE CLERK

In The

Supreme Court of the United States

AMY ROBERTSON, et vir,

Petitioners,

vs.

COUNTY OF VENTURA, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION BY RESPONDENTS COUNTY OF VENTURA, JODY KELLER, SGT. WAREHAM, SCOTT PETERSON, AND DONNA KUONEN TO PETITION FOR WRIT OF CERTIORARI

BRIAN P. KEIGHRON
LAW OFFICES OF ALAN E. WISOTSKY
Attorneys for Respondents County of Ventura, Jody Keller, Sgt. Wareham, Scott Peterson, and Donna Kuonen
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QUESTION PRESENTED

1. Should this Court review a Circuit's unpublished decision which granted qualified immunity to a social worker and three deputy sheriffs for their conduct during a child custody investigation, where there is no compelling reason and the Circuit's decision is not in conflict with other federal court decisions?

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California Welfare and Institutions Code
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PROCEDURAL BACKGROUND

On April 24, 2006, the United States District Court, Central District of California, granted respondents County of Ventura, Donna Kuonen, Deputy Jody Keller, Sgt. David Wareham, and Deputy Scott Peterson's ("respondents") motion for summary judgment. The respondents' motion for summary judgment was based on the grounds that the respondents' conduct during a child abuse investigation was protected by absolute immunity and, in addition, the individual respondents' conduct was protected by qualified immunity. The district court determined that, based on the evidence before the court, the respondents were entitled to absolute immunity for their conduct during the investigation.

The petitioners filed an appeal with the Ninth Circuit Court of Appeals. After the appeal was filed, but before the oral argument before the Ninth Circuit, the Ninth Circuit issued its decision in *Beltran v. Santa Clara County*, 514 F.3d 906 (9th Cir. 2008). *Beltran* overruled a portion of a prior Ninth Circuit decision, *Doe v. Lebbos*, 348 F.3d 820 (9th Cir. 2003), which had held in part that social workers had absolute immunity from claims that they fabricated evidence during an investigation or had made false statements in a dependency petition. After the *Beltran* ruling was issued, the Ninth Circuit requested the petitioners and respondents in the instant case to file letter briefs to further address the issue as to whether the respondents were entitled to qualified immunity for their conduct.

On April 22, 2008, after oral argument, the Ninth Circuit affirmed the district court's granting of summary judgment. The Court of Appeals reviewed the district court's grant of absolute or qualified immunity de novo. *Botello v. Gammick*, 413 F.3d 971, 975 (9th Cir. 2005). The court affirmed summary judgment in favor of the County of Ventura as to the petitioners' *Monell* claim, holding that the petitioners did not put forth sufficient evidence in opposition to the motion for summary judgment to support their contention that the County had "ratified" the employees' actions, as required by *Gillette v. Delmore*, 979 F.2d 1342, 1346-47 (9th Cir. 1992). The court found that the district court had properly granted summary judgment in favor of social worker Donna Kuonen because she was entitled to absolute immunity for her actions related to the decision to initiate the detention hearing by filing the petition and detention report, citing *Beltran, supra*, at 908. The court further found that social worker Kuonen and the deputy sheriffs were entitled to qualified immunity under *Miller v. Gammie*, 335 F.3d 889 (9th Cir. 2003) [*en banc*].

Basically, the Ninth Circuit held that the petitioners made no showing in the trial court that respondents Wareham and Peterson violated any of the Robertsons' established rights, nor was there any showing that respondents Kuonen and Keller violated any constitutional rights of which a reasonable person would have known. Accordingly, the Ninth Circuit affirmed the district court's granting of summary judgment.

REASONS FOR DENYING THE PETITION

Petitioners' petition for a writ of certiorari misstates the facts in this case and continues to assert allegations as "facts" even though the petitioners did not provide any evidence in the trial court to support their allegations.

Respondents respectfully request that the Court deny the petition and leave in place the judgment of the Ninth Circuit, which correctly held that the respondents were entitled to qualified immunity for their conduct in this case. Further, as set forth below, the Ninth Circuit's decision was consistent with case law from other circuits.

FACTS OF THE CASE

A. The Respondents Conducted a Thorough and Diligent Child Abuse Investigation

The following is a summary of the thorough and diligent investigation conducted by the social worker and deputy sheriffs in this case.

On February 24, 2004, Ryder Robertson, age eight months, was taken to Los Robles Regional Medical Center by his parents, Amy and Curtis Robertson. A nurse noticed a large, tense bulge in the anterior fontanel of Ryder's skull. A CT head scan showed that Ryder was suffering from bilateral acute and subacute hematomas that were putting pressure on his brain. Ryder was transferred to Cedars-Sinai Medical Center. The CT scans were reviewed by Cedars-Sinai pediatrician Harold

Amer, M.D., and pediatric neurosurgeon Moise Danielpour, M.D. Dr. Danielpour performed an emergency bilateral craniotomy.

After the surgery was performed, Dr. Danielpour asked Kenneth Wright, M.D., a pediatric ophthalmologist, to conduct an ophthalmological examination on Ryder. Dr. Wright's colleague, Lizbeth Vicencio-Regner, M.D., examined Ryder's eyes using an ophthalmoscope and found bilateral preretinal and retinal hemorrhages. Dr. Wright confirmed that there were bilateral preretinal and retinal hemorrhages. Dr. Amer, Dr. Danielpour, and Dr. Wright formed the opinion that Ryder's symptoms were consistent with, and likely the result of, infantile shaking or shaken baby syndrome. Dr. Amer was of the opinion that the subdural hematomas were the result of two traumatic incidents, one within the past week and another a minimum of three weeks old.

On February 26, 2004, a social worker at Cedars-Sinai contacted the Ventura County Department of Children and Family Services and made a suspected child abuse report. Ms. Kuonen, Nurse Mayernik, and Deputy Keller met with the Cedars-Sinai social worker, who informed them that Ryder's treating doctors and an ophthalmologist had indicated that Ryder's symptoms were consistent with shaken baby syndrome. Deputy Keller, Ms. Kuonen, and Nurse Mayernik conducted in-depth interviews with Amy Robertson and Curtis Robertson and discussed Ryder's medical, developmental, and child care history in extensive detail. The Robertsons stated that Ryder had been solely in the care of either Amy Robertson, Curtis Robertson, or a daycare provider since approximately January 30, 2004. The

Robertsons denied that Ryder had any falls or accidents that might have caused his injuries while the child was in their care.

Deputy Keller then interviewed Dr. Wright in detail about Ryder's injuries. Dr. Wright informed Deputy Keller that the retinal hemorrhaging observed in Ryder was virtually always caused by shaken baby or battered child syndrome and that this was based on his own training and experience and was also well documented in virtually every textbook on pediatric ophthalmology.

Dr. Amer informed Deputy Keller and Ms. Kuonen that Ryder had suffered two intracranial injuries, one which was a minimum of three weeks old and one which had occurred within the past seven days. Ms. Kuonen requested that Dr. Amer provide a medical report to the Ventura County Children and Family Services Agency.

On March 1, 2004, Deputy Keller interviewed the daycare provider, who could not provide any information as to how Ryder had been injured. However, she stated that Curtis Robertson told her that he had been in "anger management classes." Deputy Keller interviewed and obtained records from Ryder's primary care pediatrician, William Bocash, M.D. She again spoke to Amy Robertson and discussed with her the fact that her husband, Curtis, had been in anger management classes and that there had been a domestic abuse incident involving the parents in November, 2003.

On March 3, 2004, Dr. Amer provided a medical report to the Ventura County Children and Family Services. The report stated that the constellation of findings was most consistent with trauma as one sees with infantile shaking, and the subdural hematomas indicated at least two traumatic occurrences, one probably less than one week old and one probably more than two to three weeks old.

On March 3, 2004, Senior Deputy Scott Peterson and Deputy Keller met with Amy and Curtis Robertson. Deputy Peterson asked the Robertsons to make a pretext call to the daycare provider. A pretext call is one in which one party, either a parent or a victim, will make a monitored and tape-recorded phone call to another party, a possible suspect, for the purpose of asking the suspect specific questions to see if the suspect's answers contradict what she either previously had told or subsequently tells investigators. Pretext calls are common investigatory procedures in child abuse cases. However, the Robertsons refused to do the pretext call and expressed concern that the pretext call might implicate themselves.

On March 3, 2004, Ms. Kuonen believed that it was necessary to file a California Welfare and Institutions Code Section 300 petition for detention of the child because (1) the child had sustained serious, life-threatening head injuries; (2) medical experts at Cedars-Sinai had opined that his injuries were consistent with infantile shaking; (3) the child's parents and daycare person could not provide any explanation regarding trauma or accidents which might account for the child's injuries, and they could not be ruled out as the person(s)

causing the injuries; and (4) the child was in danger of future injury or death if he was returned to the parents.

The Section 300 petition and detention report was filed with the juvenile court on March 8, 2004. The purpose of the detention report was to provide the juvenile court judge with information regarding the investigation, medical history, parent history, letter of detriment, and an individual health care plan to enable the judge to review the case and determine whether a prima facie case existed to temporarily place the child's care with the Human Services Agency pending disposition or further order of the court. Ms. Kuonen gave the parents notice of the detention hearing and provided them with dependency court and right-to-counsel information.

On March 8, 2004, Sgt. Wareham called the Robertsons and requested that they come to the sheriff's station. At the sheriff's station, the Robertsons submitted to two voice stress analysis (VSA) tests. The VSA tests showed that Amy Robertson was not deceptive but that Curtis Robertson was deceptive on certain questions. Curtis Robertson was given a third test, and the results again showed that he was being deceptive. The Robertsons were advised of the test results.

A detention hearing was held on March 10, 2004. The parents and their attorneys appeared in court. The Ventura County Superior Court judge found that there was prima facie evidence to support continued detention of the child and that temporary placement and care was vested with the Human Services Agency pending disposition or further order of the court.

On March 11, 2004, Ryder was discharged from the hospital and was placed with a licensed foster parent for one day. The Human Services Agency conducted an expedited relative approval which permitted Ryder to be placed in the care and custody of his maternal grandfather, Homer Caston, and Mr. Caston's wife, Helen Caston, the next day.

On March 15, 2004, Neal Kaufman, M.D., the head of the Cedars-Sinai Suspected Child Abuse and Neglect Team, also sent a letter to the County of Ventura. Dr. Kaufman's letter stated, among other things, that the consensus of the doctors caring for Ryder Robertson at Cedars-Sinai Medical Center was that his signs, symptoms, and evaluation were most compatible with shaken baby syndrome which occurred about one to six weeks prior to his admission to Cedars-Sinai. The letter also stated that the acute bleed could have been caused by a second injury within one week prior to admission, although it could have resulted from a very minor trauma in the context of the existing subdural hematoma.

From March 12, 2004, until August 16, 2004, Ryder was in the Castons' care. While Ryder was in the care of the Castons, the petitioners saw and interacted with their child virtually every day. The Superior Court returned custody to the parents on August 16, 2004. The detention of Ryder Robertson from March 11, 2004, through August 16, 2004, was pursuant to a lawful Superior Court order.

In their opposition to respondents' motion for summary judgment, the petitioners failed to provide any factual support for their conspiracy, false report, and

inadequate investigation allegations and failed to establish any genuine issue of fact in this case.

B. The Ninth Circuit's Holding Is Consistent with Other Circuits

The Second Circuit had previously granted qualified immunity in a case involving factual circumstances similar to the instant case. In *Van Emrik v. Chemung County Department of Social Services*, 911 F.2d 863 (2d Cir. 1990), the parents of a child who was a suspected abuse victim and who was temporarily taken from the parents' custody filed an action against child protective services caseworkers and the county Department of Social Services, alleging violation of their custody rights. The Van Emriks had taken their child to an emergency room at a local hospital. At the hospital, the child was diagnosed as suffering from a spiral fracture of the right leg.

The parents suspected that a babysitter had inflicted the injury. The emergency room physician told the mother that a child abuse report would be made. The child abuse report stated that the parents had no explanation for the injury but also indicated that the babysitter may have been responsible. A physician expressed the opinion that the nature of the injury was a "very suspicious" indication of child abuse. Another physician opined that the injury would require a significant amount of energy, though it could have occurred from an accidental fall. *Van Emrik*, 911 F.2d at 864-865.

A social worker concluded that, with the cause of injury unascertained, the child could be in danger if returned home, and decided to file a petition under the New York Family Court Act. The judge signed an order temporarily placing the child in the custody of the department. Ultimately, an investigation was conducted which ended without any determination of who was responsible for the injury. *Van Emrik* at 865.

The *Van Emrik* court noted that the individual defendants enjoyed qualified immunity from liability for damages if, at the time of the pertinent episode, it was not clear that the actions they took violated established constitutional rights or if it was objectively reasonable for them to believe that their actions did not violate such rights as were then clearly established. After reviewing the facts, the court concluded that the individual defendants were entitled to the defense of qualified immunity:

> Though a decision to remove a child from parental custody implicates the constitutional rights of the parents, it obliges protective services caseworkers to choose between difficult alternatives in the context of suspected child abuse. If they err in interrupting parental custody, they may be accused of infringing the parents' constitutional rights. If they err in not removing the child, they risk injury to the child and may be accused of infringing the child's rights. It is precisely the function of qualified immunity to protect state officials in choosing between such alternatives, provided that there is an objectively reasonable basis for their decision,

> whichever way they make it. Such a basis existed in this case.

Van Emrik, 911 F.2d at 866.

The *Van Emrik* defendants were confronted with an infant who had suffered an injury characterized by an attending physician as "very suspicious" of child abuse. Inquiry of the people possibly responsible, the parents and the babysitter, failed to discover how the injury was sustained. The defendants consulted with superiors and obtained a court order. The court held that the issue was not whether it was absolutely essential to remove the child or whether a more sensitive course might have been to leave the child hospitalized pending further investigation. Rather, *"[t]he issue is whether it was objectively reasonable for the defendants to make the decision they made, and no rational jury could find that it was not."* *Van Emrik*, 911 F.2d at 866 [emphasis added].

The analysis of the *Van Emrik* court in granting qualified immunity applies to the instant case. In fact, the granting of qualified immunity in the instant case is even more justified. Here, the County respondents were confronted with an infant who had suffered subdural hematomas and bilateral retinal hemorrhaging. They were told by Dr. Wright that the injuries were virtually certain to have been caused by shaken baby syndrome and were told by Dr. Amer that the child had sustained two head injuries, one within the past week, and that they were consistent with infantile shaking.

In addition, the County respondents did much more than a "quick inquiry" of the incident and the

causes of the child's injuries. They did a very detailed and thorough investigation, conducting multiple interviews of the doctors, parents, and daycare person and obtaining medical records. The respondents determined that only three persons — the mother, father, and daycare person — had custody of the child during the period that the injury likely occurred. However, none of those three persons had an explanation for how the injury occurred and thus could not be ruled out as the person(s) responsible for the injury.

There is no evidence in this case that the individual respondents filed false reports or false affidavits. Petitioners had ample opportunity to produce evidence to support their allegations and did not do so. Petitioners are now simply repeating these false allegations, again without evidence. The district court properly granted summary judgment to the respondents, and the Ninth Circuit properly affirmed it.

The Ninth Circuit's decision granting qualified immunity to the County respondents is consistent with rulings in other circuits. See *Gomes v. Wood*, 451 F.3d 1122 (10th Cir. 2006). Under the facts of the instant case, it was objectively reasonable for the individual respondents to take the actions they did and to make the decisions they made, and they reasonably believed that their conduct was lawful. They are entitled to qualified immunity.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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